

## APPEAL NO. 93177

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act). On February 9, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The sole issue was whether Mr W, the decedent, and father of Ms W, a minor, was an employee of (Cab Co.), or whether he was an independent contractor on the date of his fatal injury, (date of injury). The hearing officer determined that the decedent was an independent contractor and not an employee of the Cab Co. on (date of injury), when he was killed. Appellant, beneficiary of the decedent (claimant), contends that the hearing officer erred in his interpretation of the law, that the decision was against the great weight of the evidence and requests that we reverse the hearing officer's decision and render a decision in claimant's favor. Respondent did not file a response.

## DECISION

The decision of the hearing officer is affirmed.

The evidence in this case is fairly and accurately set out in the hearing officer's statement of evidence and findings of fact and is adopted for purposes of this decision. The facts are not so much in dispute as is their interpretation. One fact inexplicably not mentioned by the hearing officer, which we feel is significant, is claimant's Exhibit 4, an "Independent Contractor Agreement for Drivers" dated February 19, 1991, made out for, but not signed by the decedent. However, during the CCH both parties stipulated that the "contract" was "in effect and controlling" on the date of decedent's death. Some of the provisions of that contract were that decedent was to pay a "lease fee" of \$45 per day for use of the taxicab, and paragraph 5)(i) recites the "driver is to act as an independent contractor and . . . shall not be deemed . . . as having any employee status. . . ." Paragraph 10) recites, "[t]his agreement has been entered into with the sanction of the City . . . which creates a relationship of Independent Contractor between the driver and (Cab Co.)." The claimant contends provisions in the contract such as Paragraph 5)(d) that the "[d]river shall not own, operate, manage, or in any way control the operation of a taxicab or its driver at any other company in (the county)" show decedent to be an employee, and argues the provision in Paragraph 5)(i) which states that the licensee is not "deemed or construed as an employee under the Workman's Compensation Act . . . (or) that if he/she is entitled to coverage under the Workman's Compensation Act, he/she reserves all rights at common law. . . ." to be void under Article 8308-3.09 which declares void "an agreement by an employee to waive the employee's right to compensation. . . ."

The hearing officer's pertinent findings of fact set out the basic conditions under which the Cab Co. and decedent operated and are as follows:

## **FINDINGS OF FACT**

- 4.The Deceased leased a taxicab from Cab Company by the day by paying a daily rental of \$45.00.
- 5.The Deceased could choose the hours to operate or not to operate the taxicab he leased.
- 6.The Deceased could operate the taxicab when and where he chose, subject to governmental regulations.
- 7.The Deceased could make a profit or loss in his operations of the taxicab without accounting to Cab Company.
- 8.Harlem Cab Company did not provide direct control over the Deceased's operations of his taxicab.
- 9.Harlem Cab Company did not pay any wages to the Deceased for his operating a taxicab leased from the company.
- 10.Harlem Cab Company did not withhold any funds for taxes for the Internal Revenue Service, F.I.C.A., F.U.T.A., or for the State of Texas Unemployment Commission.
- 11.At his option, the Deceased could use or not use the dispatching system of Cab Company, without limitation or control by the company.

The parties used the definition of independent contractor in Article 8308-3.05(a)(1) which states an independent contractor ordinarily:

- (A)acts as the employer of any employee of the contractor by paying wages, directing activities, and performing other similar functions characteristic of an employer-employee relationship;
- (B)is free to determine the manner in which the work or service is performed, including the hours of labor of or method of payment to any employee;
- (C)is required to furnish or have his employees, if any, furnish necessary tools, supplies, or materials to perform the work or service; and
- (D)possesses the skills required for the specific work or service.

Claimant in her appeal states, "[t]he right to control the work of the person is the essence of the issue. . . ." We do not disagree. Claimant then states the decedent ". . . did not sign any agreement that would alter the employer-employee relationship." However, we would note that there was a "standard" Independent Contractor Agreement for Drivers which the parties stipulated was "in effect and controlling" and which specifically spelled out an independent contractor arrangement.

Next, claimant makes the point that "one key element in exercising control is whether the worker or the employer provides the tools." It is claimant's contention that the Cab Co. provided the "most essential tool," i.e., the taxicab, and hence the decedent was the Cab Co.'s employee. We would observe that decedent furnished the cab necessary to perform the work by means of leasing it from the Cab Co. To come to a different conclusion would mean that the Cab Co. could never lease out a taxicab without making the lessee an employee and there could be no such thing as an independent contractor, unless the driver was also the owner.

Claimant also points to the provision in the "contract" where the Cab Co. ". . . prohibited it (sic) drivers from owning, operation, managing, or in any other way controlling the operation of a taxicab or its driver at any other company. . . ." as authority that decedent was actually an employee rather than an independent contractor. The unrefuted testimony of Ms M, the Cab Co.'s co-owner, was that the cited provision of the contract was required by the city in order for Cab Co. to have a license to operate a taxicab company. Indeed, on cross-examination of Ms. M, it was clear she did not understand how this portion of the contract worked when confronted with hypotheticals involving the provision. Insertion into the independent contractor contract of such provision, required by the city would not have the effect of changing an independent contractor contract into an employer-employee relationship.

Claimant also argues that no specialized skill was required to provide this service in that "one only need to have a valid Texas driver's license." This statement disregards the unrefuted testimony that before one was eligible to be a taxicab driver, one was required to pass a city test, which required specialized knowledge over and above that required for a regular driver's license. We find that the requirement to pass this city administered test is sufficient to meet the required special skills necessary to be considered an independent contractor.

Finally, claimant argues that "[t]he most important factor in determining whether an employer-employee relationship exists is the right to hire and fire the worker." Claimant argues that the Cab Co. possessed "the absolute right to terminate the drivers at will." Actually the decedent leased the taxicab on a daily basis (the testimony was that the lease fee was sometimes paid daily, sometimes paid weekly) and the Cab Co. retained the ability to decide to lease or not lease the taxicab, just as anyone has a right to decide

whether or not to hire or not to hire any independent contractor. The ability to refuse to lease its property to a specific individual does not create an employment relationship when property is leased.

Both the hearing officer and the claimant, in closing argument, cite Thompson v. Travelers Indemnity Company of Rhode Island, 798 S.W.2d 277 (Tex. 1990). That case held:

The test to determine whether a worker is an employee or an independent contractor is whether the employer has the right to control the progress, details, and methods of operations of the employee's work. (Citation omitted). This same test applies whether the claim arises at common law or under workers' compensation. (Citation omitted). The employer must control not merely the end sought to be accomplished, but also the means and details of its accomplishment as well. Travelers Ins. Co. v. Ray, 262 S.W.2d 801, 803 (Tex. Civ. App.-Eastland 1953, writ ref'd). Examples of the type of control normally exercised by an employer include when and where to begin and stop work, the regularity of hours, the amount of time spent on particular aspects of the work, the tools and appliances used to perform the work, and the physical method or manner of accomplishing the end result.

The Cab Co. did not tell decedent when or where to begin work, or even whether to work at all; decedent was not required to keep any regular hours; and he could spend as much or as little time as he wished at any location. The only thing the Cab Co. did was lease decedent a vehicle under its franchise whenever decedent chose to avail himself of that opportunity. The Cab Co. exercised absolutely no control over the details of decedent's work and only required that decedent comply with applicable governmental laws and regulations.

*Compare* the instant case with the situation in Rodriguez v. Zavala, 279 S.W.2d 604 (Tex. Civ. App.-San Antonio 1955, no writ history). In Rodriguez, although the taxicab was owned by the driver, the driver paid the taxicab company 30% of his fares, operated out of the company's office, was dispatched by the company, was subject to control by the company with reference to transportation of passengers, and was on duty and on call for the company when an accident occurred and was transporting passengers, who had placed a call to the company for service. The court held that the driver was an employee, as opposed to an independent contractor, and the owner of the taxicab company was liable for the negligence of the driver.

Finding that the hearing officer's determinations are supported in law and fact, we affirm the hearing officer's decision.

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.  
Chief Appeals Judge

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Philip F. O'Neill  
Appeals Judge